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No. 92-1287

In The

Supreme Court of the United States

October Term, 1992

ROBERT TAYLOR and TIMOTHY COTTON,

Petitioners,

v.

FLORIDA ATLANTIC UNIVERSITY; HELEN POPOVICH; KENNETH MICHELS; DENNIS NICEWANDER; DON GARDNER; MARILYN FLOYD; LEONARD BERRY; and ANTHONY CATANESE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONSE IN OPPOSITION OF FLORIDA ATLANTIC UNIVERSITY, HELEN POPOVICH, DON GARDNER AND ANTHONY CATANESE

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QUESTIONS PRESENTED

1. Whether the jury instructions properly stated the requirements of liability under 42 U.S.C. § 1983 in a case involving allegations of unconstitutionally inflicted punishment for speaking?

2. Whether the District Court's evidentiary ruling excluding expert testimony on the grounds that it would not be of assistance to the jury constituted a proper application of Fed. R. Evid. 702?

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RESPONSE IN OPPOSITION OF FLORIDA ATLANTIC UNIVERSITY, HELEN POPOVICH, DON GARDNER AND ANTHONY CATANESE

Respondents Florida Atlantic University, Helen Popovich, Don Gardner and Anthony Catanese respectfully ask this Court to deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case.

STATEMENT OF THE CASE

A. Introduction

This petition invoives a single ruling by the trial court on jury instructions, and an evidentiary ruling excluding the testimony of petitioners' proposed expert witness on "whistleblowing." When viewed in the appropriate factual context, it is clear that the questions isolated for review do not present appropriate grounds for invoking this Court's discretionary jurisdiction.

B. The Course of Proceedings

Petitioner Robert Taylor commenced this action in January of 1989 by filing a complaint seeking declaratory and injunctive relief and damages against respondents Helen Popovich, Don Gardner, Leonard Berry, Marilyn Floyd, Kenneth Michels and Dennis Nicewander. R1-1. The complaint alleged that the defendants had conspired to retaliate against Taylor for the exercise of his First and Fourteenth Amendment rights, and further sought relief pursuant to Florida's "Whistleblower's Act." Fla. Stat. § 112.3187 (1986). R1-1. Shortly thereafter, an Amended Complaint was filed which added Timothy Cotton as a plaintiff, and which sought the same relief on essentially identical allegations. R1-15.

Petitioners filed a Second Amended Complaint which named Florida Atlantic University ["FAU"] as a defendant. R1-32. The Second Amended Complaint, upon which petitioners proceeded to trial, alleged that Taylor was punished because he participated in investigations by the State Attorney's Office and the Board of Regents

into purchasing improprieties at FAU which Taylor had discovered. R1-32-4. Petitioners alleged that Cotton was punished because he sent a memorandum nominating Taylor to receive an award for his role in exposing corruption, and because he openly criticized the administration about problems associated with the Broward Tower facility. R1-32-6.

After Anthony Catanese replaced Popovich as president of FAU, the trial court entered an order substituting Catanese as defendant in his official capacity only for Popovich in her official capacity. R9-297.

The trial court entered summary judgment in favor of respondents on the state "Whistleblower's Act" count. R9-300. After a three week trial, the jury returned a verdict in favor of all respondents. R10-345. Consistent with the jury's verdict, the district court denied the declaratory and injunctive claims against FAU and Catanese. R10-347. Final judgment was entered in favor of respondents, and petitioners' post-trial motions were denied.

On September 29, 1992, the Eleventh Circuit Court of Appeals affirmed the final judgments without a written opinion.

C. Statement of Facts

Petitioners' statement of facts is replete with inaccuracies, misstatements, and broad conclusions not supported by the evidence. The statement also omits pertinent evidence relating to the issues raised in the petition.

1. FAU's Organization

Respondent Popovich was the President of FAU until 1988. In 1986, Michels was Provost and Vice-President for Academic Affairs, and Nicewander was the Vice-President for Administrative Affairs. Floyd was Assistant Vice-President for Academic Affairs, and reported to Michels. Berry replaced Michels in 1987.

FAU's computing functions were originally divided into two separate departments: academic computing, which was responsible for providing services to the faculty, and administrative computing, which was responsible for servicing the registrar and the administrative needs of the University. R15-123. Those in academic computing, including Taylor and Cotton, ultimately reported to Michels, and later to Berry. Those in administrative computing reported to Nicewander, and later to Perkins, who is not a party to this action.

Respondent Gardner was hired in 1988 as Associate Vice-President for Information Resource Management, and was in charge of reorganizing and consolidating the University's computing departments. R22-1491-93; R27-2516. Gardner was *not* hired to "replace" William King, who was the Director of Academic Computing, and Taylor's direct superior.

2. Taylor's Allegations of Improprieties in 1986, Media Attention, and FAU's Response

In 1985, Taylor began questioning procurement practices at FAU when Lillian Gerweck, a purchasing agent, went to Taylor with questions regarding a requisition she

had received for a personal computer – an IBM clone. R20-992, 996-997, 999. There was no apparent reason for the requisition to have been made as a "sole source" purchase because a similar computer could have been purchased for less money through a pre-bid state contract. R20-999. Having gotten no answers from the supplier, Gulfstream Microsystems ["GMS"], Gerweck approached Taylor. R20-999, 1000.

The petition inaccurately states the nature of Taylor's duties in the area of "approval" of computer purchases. Taylor's *only* approval function was to review requisitions for computer purchases by any academic department to ensure that the equipment or software was compatible with the equipment already in place. R19-647, 653-654, 657. When he was presented with the "sole source" requisition for the GMS computer, Taylor approved it for compatibility. R19-664. While he had a concern that the computer should not have been requisitioned as a "sole source" item, he did not "disapprove" the purchase. R19-660. When Gerweck later brought another requisition for eight GMS computers to Taylor, he approved that purchase for compatibility as well. R19-678. Taylor took his concerns about the GMS computer purchases to King, and together they brought the matter up before the computer advisory committee, whose function it was to give faculty input to the administration regarding the needs of the faculty, and to give general guidance on policy issues. R19-660, 674; R23-1741, 1742. The committee's response was that the matter was an administrative concern which should be dealt with through administrative channels, and not a

matter for committee consideration or action. R19-674; R23-1742.

Taylor discussed his concerns about the computer purchase with John Morack (who reported to Nicewander), and told him that he should not approve the purchase. R19-666-68. Morack agreed that he would not sign the form, and the requisition form was ultimately signed by Nicewander when Morack was on vacation. R19-671; R20-908. Nicewander was unaware that anyone had raised questions regarding the propriety of the sole source requisition for the GMS computer before he signed the form approving the purchase. R28-2663, 2726.

Taylor enlisted the assistance of his friend, John Munson, a tenured professor. R15-118, 127. During the spring and summer of 1986, Munson and Taylor continued looking into purchasing practices by FAU, utilizing Taylor's access to information flowing through the computer center. R15-136: R17-223; R19-680. Dissatisfied with the results of Munson's attempts to speak to Dean Luing (who had initially requisitioned the GMS computer) and Jeff Tennant, an assistant vice-president, Munson and Taylor decided that the best course of action was to take their concerns to the Palm Beach County State Attorney's office, and Munson did so in September of 1986. R15-138, 140, 144-145, 151; R19-678, 683.

The State Attorney's office launched an investigation into FAU's purchasing procedures in which Taylor participated by providing information. R19-683, 685-686. Cotton admittedly had nothing to do with the State Attorney's investigation, other to than suggest it as a

possibility. R21-1202. After approximately two months, finding nothing in the nature of criminal conduct, the State Attorney's office determined that the problems at FAU were internal and should be handled by another agency. R17-341. Ultimately, Harvey Sweeney, Chief Internal Auditing Officer for the Board of Regents, conducted an audit which culminated in issuance of a report critical of the leadership provided by upper management. R17-253, 259.

President Popovich learned of the State Attorney's investigation from Chancellor Reed in early October. R22-1432. Before that time, she had been unaware of Munson's and Taylor's allegations of improprieties. R22-1432, 1433. In the following days, Popovich investigated the computer purchases, which she thought presented the most serious problem. R22-1438, 1439. On October 13, 1986, Popovich met with Chancellor Reed who suggested that Harvey Sweeney conduct an audit, which Popovich agreed would be a good idea. R22-1440.

On October 30, 1986, after Sweeney's audit was completed, Popovich held a meeting with those involved with the allegations, including Gerweck, Taylor, and Munson. R22-1441-42. The purpose of the meeting was to find out what had happened in order to take whatever corrective action was needed. R15-161; R22-1442-43. The meeting was not successful because, Popovich later learned, lower level employees said they did not feel free to talk in front of their superiors. R22-1444. The meeting confirmed to Popovich that there were significant problems with sole source purchases, and she undertook corrective measures. R22-1444-45.

After the meeting Taylor spoke to the press about his allegations and his frustrations with the administration's response. R19-696, 703-704. During the fall of 1986, the appearance of newspaper articles quoting Munson and Taylor escalated in frequency, and the articles were increasingly critical of the administration. R27-2419; R28-2703; R19-703-5.

As a result of complaints from employees in the purchasing department that media requests for information were interfering with their ability to get work done, Nicewander issued a memorandum to the administrative directors who reported to him regarding responses to media representatives. R15-169; R28-2687-89. When Popovich learned of the memorandum, she asked Nicewander to rescind it immediately, fearing that it would be perceived as "stonewalling." R22-1453-54. Nicewander promptly did so, and issued a memorandum the next day which stated that the earlier memorandum was not intended to convey the message that employees were not to respond to media inquiries. R17-173; R28-2690.

During November of 1986, the allegations of improprieties continued. R22-1454. Popovich admitted that there were deficiencies in management and, eager to get those problems resolved, worked with Chancellor Reed and a Board of Regents task force, headed by Roberta Maddox, to prepare and implement a plan to improve management practices at FAU. R22-1455-58, 1462-64; R23-1550. The intense media coverage resulted in an erosion of public confidence in the ability of Nicewander

and Michels to continue in their positions as vice-presidents, and Popovich asked for their resignations on December 5, 1986. R22-1460; R23-1548.

In 1987 the cabinet set about the business of working through the task force reports, and getting the University's business affairs in order. R22-1480. Munson left in FAU in 1988, and he testified that by that time, all of the events of 1986 had blown over. R15-174; R17-184.

3. Cotton's Statements to the Press

In early 1987, when FAU's Tower facility opened in Broward County, Cotton spoke to the media about problems associated with the facility, and openly criticized the administration. R22-1481; R20-1061-63, 1068. Cotton again spoke to reporters in December of 1987, calling the Tower a "glittering glass goolog." R21-1092-95. There was no evidence that Cotton spoke to the media regarding the purchasing improprieties which were at issue in 1986.

4. King's 1987 Reorganization of Academic Computing, the Aftermath, and the Attempted Transfer of Taylor

The petitioners' statement of facts represents a serious distortion of the evidence related to the events following the publicity of 1986, and the reorganization of FAU's computing departments.

William King was an employee of Southeast Regional Data Center ["SERDAC"], which contracted with FAU to manage the academic computing center. R24-1917, 1920. Taylor was associate director of academic computing, and

his primary function was to serve as a communications conduit to King. R24-1927.

Due to the expansion of staff and an increase in the use of computers, King decided to reorganize academic computing in early 1987. R24-1952-55. Because the job had gotten too unwieldy for only one associate director, the reorganization created two new assistant director positions which reported to King, one of which went to Cotton. R24-1952-53. With responsibility for reporting spread out, King believed there would be more effective communication. R24-1954.

During 1987 Taylor and King exchanged memoranda, electronic mail messages and "personal counseling notes" – none of which went into Taylor's personnel file – regarding various performance issues. R24-1956-57, 1961-79, 1981, 1985-1994.[1] King felt that Taylor had a "blue collar" mentality, and that he was not a self-starter. R19-719; R24-1964. In a written response to one of King's personal counseling notes in October of 1987, Taylor acknowledged performance problems and said that he was "feeling the depression from the fallout of the Michels, Nicewander debacle," despite the fact that nothing had transpired in the intervening year which would keep him involved in the issue. R20-803; R24-1978-79.

Between October of 1987 and February of 1988, Taylor's performance did not improve. R24-1999. Prompted by a loud and disruptive argument in the hallway between Taylor and his girlfriend, King sent Taylor a

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[1] These memoranda were kept by King in his personal file regarding Taylor. R24-1958.

performance counseling note, which did go to his personnel file, addressing some of the concerns which had been discussed in the preceding months, including Taylor's failure to remain technically current. R20-807-9; R24-1999-2006. Taylor's written response directly challenged the need to remain technically current, saying that was not in his job description. R20-813; R24-2009.

On February 18, 1988, King sent Taylor a memorandum temporarily reassigning him to the Broward County campus to fill in for an employee, Margie Bullock, who was going on maternity leave. R24-2007. King's decision was based on two considerations: continuity of supervision at the Broward facility, and splitting up Taylor and his girlfriend. R24-2007. Taylor was furious, and alleged the transfer was in retaliation for his whistleblowing activity in 1986. R19-727. He took his grievance to King's superiors; first to Floyd, then to Berry, and finally to president Popovich. R19-727-31. Cotton involved himself in the transfer issue, and sent several memoranda and electronic mail messages to King in an effort to keep Taylor from having to go to Broward County. R21-1104, 1148-53; R26-2033, 2042.

Ultimately, it was determined that Taylor would not be reassigned, and the position was filled by someone outside the department, Fritz Postelwaite. R26-2044. The announcement of Postelwaite's assignment generated a flurry of angry electronic mail messages between Cotton and King. R26-2045-49, 2068-76. After the announcement, Taylor sent an electronic mail message to the entire academic computing staff which stated that he felt the attempted transfer had been in retaliation for his whistleblowing activities. R26-2055-56.

In response to the turmoil created over the attempted transfer, Berry called a meeting of the academic computing staff on March 25, 1988. R29-2866-72. At the meeting, Taylor called King a "coward" and a "bully." R20-861. In front of the entire staff, Cotton read the contents of a memorandum to King wherein he called the administration "Bozos;" suggested poor judgment on the part of King and his superiors regarding the transfer issue and the assignment of Postelwaite; and questioned King's authority to assign staff. R21-1177-85.[2]

5. FAU's Consolidation of Computing Departments and Gardner's Hiring

As a result of problems in administrative computing, and an explosion of use needs, Popovich was dissatisfied with the configuration of the FAU's computing departments, and again asked for the assistance of Roberta Maddox in making recommendations in that area. R22-1491-92. The decision was made to reorganize the departments in order to bring academic computing and administrative computing under one person who could make more efficient use of personnel. R22-1493. A search committee was appointed, and Gardner was eventually hired for the newly-created position of Associate Vice-President for Information Resource Management. R22-1491-94.

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[2] It was after this meeting that Berry told Sycamore that he wanted to "get rid of all three of them." R18-595, 600. Sycamore did not testify, as represented by petitioners, that Berry told him that Cotton and Taylor were going to be fired for "whistleblowing."

Shortly after the March staff meeting, King recommended that Cotton and Taylor be given terminal contracts for insubordination. R26-2092. Berry thought King was part of the problem, and that he and Cotton and Taylor had all let personal problems interfere with their work. R29-2875. He knew that King would be leaving soon, and thought there was a good chance that Taylor and Cotton could operate differently under different management. R29-2875. When the issue was brought to the attention of Popovich, she thought that it was important for Gardner to look at the issue fresh, and would not authorize any major personnel changes. R22-1523. King was advised that decisions regarding organizational changes would be left to the new associate vice-president. R26-2094.

6. The Non-renewals

Prior to Gardner's arrival on July 11, 1988, he had heard brief references to personnel problems in academic computing from King. R27-2504, 2512. Gardner specifically denied he had been advised that he would be required to terminate petitioners if he took the job. R27-2509.

Knowing he would have to make decisions about new contracts by the first week of August, Gardner asked that updated resumes and personnel files of all employees who would be reporting to him be made available for his review. R27-2511-12. After he arrived on campus, he spoke to King about Taylor and Cotton. R27-2519-22. King told Gardner about the transfer issue, his dissatisfaction with Taylor's work habits, and his lack

of work ethic. R27-2520. King did not talk about Taylor's whistleblowing activities in 1986. R27-2531. King was very negative about Cotton, and told Gardner that he was arrogant. R27-2522, 2547.

In Gardner's interview with Taylor, he asked Taylor about his professional goals. R27-2529. Taylor advised that he wanted to be director of academic computing in 5 years – a goal Gardner thought unrealistic based on Taylor's resume. R27-2529. Taylor wanted to discuss his whistleblowing activities, and the perceived plot to retaliate against him. R27-2530. Although Gardner told him he was not interested in what had happened in the past, Taylor talked about it anyway. R27-2530. Gardner asked him why he did not accept the transfer to Broward, and Taylor responded that it was inconvenient. R27-2530. Gardner was left with a negative impression, and the perception that if Taylor was asked to do something he did not want to do, he would claim it was in retaliation for whistleblowing, and that no one could make him do it. R27-2531. In essence, he had found a way of granting himself tenure. R28-2601.

When Gardner reviewed Taylor's personnel file, what stood out was Taylor's contention that it was not important that he remain technically current – a position Gardner thought was incredible. R27-2534. Gardner did not see King's file on Taylor which contained the personal counseling notes from 1987 until after the lawsuit was filed. R27-2536. Based primarily on the interview and the personnel file, Gardner determined that Taylor was minimally qualified for the job he had, and that he did not fit into his reorganization plans. R27-2538, 2540. As far as Gardner was concerned, the whistleblowing of 1986 was

a dead issue, and had nothing to do with his decision. R27-2541-42.

Before the interview with Cotton, Gardner received his professional goals which included "being able to admit that I am wrong on those extremely rare occasions when, in fact, I am wrong . . . " R21-1226; R27-2546. This was followed by a list of 20 questions which created the perception that Cotton was going to interview him. R27-2548. Gardner had never seen anything like it, and the list of questions confirmed the abrasiveness and arrogance of which King had spoken. R27-2552. During the interview, Gardner felt that Cotton only wanted to talk about plots and intrigue and hidden agendas, which was repugnant to Gardner. R27-2553. Gardner told him two or three times that he was not interested in the past, and cut him off. R27-2554. Gardner thought that Cotton would not be a productive team player, and made the decision that his contract would not be renewed. R27-2555-56. Gardner did not know that Cotton had ever spoken to the press, and testified that no other defendant had a part in making the decision to issue a terminal contract. R27-2556.[3]

When Gardner asked Popovich for authority to issue terminal contracts to Taylor and Cotton, she did not give him an immediate answer. R27-2560. Gardner was concerned that she would not give him the authority to issue the non-renewals. R27-2561. Popovich ultimately gave

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[3] Cotton looked at his own personnel file shortly after being notified of the non-renewal, and admitted that there was no "paper trail" in the file which could have influenced Gardner's decision. R21-1222-23.

her approval knowing that it would precipitate a lawsuit because she thought it was important to allow Gardner, as manager, the prerogative to make changes where he thought necessary. R22-1500-01.

7. Snyder's testimony

Adelaide Snyder was the linchpin of petitioners' case. Her credibility was challenged by virtue of the fact that she was forced to retire from her position as Vice-President for University Relations under circumstances which were embarrassing to her. R18-465-69. She was criticized for her ineffectiveness in defending FAU in the daily onslaught of negative press in 1986. R18-496.

Snyder testified that the controversy surrounding the allegations of improprieties was the only topic discussed at some cabinet meetings, and that the issue of how best to get rid of petitioners was also discussed. R28-430-34. She claimed Popovich thought they should find a way to terminate them, and that they could develop sufficient reasons to issue terminal contracts. R18-437-38. Snyder testified there was discussion of "creating a paper trail" which would support such a termination. R18-441.

Snyder claimed the discussions regarding petitioners did not end after Michels and Nicewander resigned, but did arise with less frequency until the point at which discussions regarding hiring a new vice-president for information management began. R18-444-47. According to her, members of the administration discussed the fact that a new position could be created for the purpose of

terminating petitioners without it looking like a continuation of the prior problem. R18-450-55.

Snyder's testimony regarding discussions of a plan to terminate petitioners was refuted by every past and present administration member, and each witness who was in attendance at cabinet meetings. R22-1473-74, 1476, 1480-81, 1484, 1487, 1495, 1498, 1506, 1544; R23-1617-18, 1626-27, 1727; R24-1776-77, 1779, 1782, 1790-91, 1796, 1805, 1866, 1951, 1998; R26-2095-97, 2107, 2126, 2272-74, 2277, 2281; R27-2299, 2304, 2315, 2319, 2415-17, 2429-30, 2509, 2542, 2544-45, 2556; R28-2685, 2700; R29-2769, 2784, 2848, 2876, 2917.

SUMMARY OF THE ARGUMENT

Petitioners proceeded below on a theory of retaliatory conduct, claiming they were unconstitutionally punished for speaking. The jury was properly instructed on the elements of liability under this theory, and the single ruling on jury instructions challenged here does not justify issuance of the writ requested.

Petitioners state that the courts below "ruled" that "a plaintiff must prove that state officials, in taking adverse employment action, *intended* to violate plaintiff's constitutional rights." Petition, p.3. The courts below "ruled" no such thing. Rather, the trial court overruled petitioners' objection to a general, prefatory instruction explaining 42 U.S.C. § 1983 liability. The remainder of the jury instructions which related to the specific deprivation alleged in this case properly informed the jury of the requirements for liability based on retaliatory conduct.

Neither the district court nor the circuit court held that a plaintiff may not use an expert witness on "whistleblowing" in the appropriate circumstance. Under the facts of this case, however, such evidence would not have been of assistance to the jury in resolving the credibility dispute with which it was confronted. The trial court's ruling was a straightforward application of Fed. R. Evid. 702, and does not suggest the need for clarification of that rule by this Court.

ARGUMENT

I. THE JURY INSTRUCTIONS FULLY AND ACCURATELY ADVISED THE JURY OF THE APPLICABLE LAW ON § 1983 LIABILITY BASED ON RETALIATORY CONDUCT; THEREFORE, THE DECISIONS BELOW DO NOT JUSTIFY ISSUANCE OF THE WRIT TO REVIEW THE ISSUE

The jury in this case was instructed on the requirements for liability under a retaliatory discharge theory in accordance with *Mt. Healthy City School Dist. Board of Education v. Doyle*, 429 U.S. 274 (1977). These instructions were prefaced by a general, preliminary instruction which stated that 42 U.S.C. § 1983 allows a plaintiff to recover from one who "intentionally" violates his constitutional rights. Petitioners' elaborate argument, spun from the single word "intentionally," improperly frames the issue for review in a vacuum.

This case involves allegations of *punishment* for speaking. Plainly, the terms "punishment" and "retaliation" connotate more than negligent conduct. Indeed, the

Second Amended Complaint alleged that respondents' actions were taken to "intentionally hinder, obstruct and injure the Plaintiffs' career advancement within FAU." R1-32-9. Petitioners never contended respondents' actions were anything *less* than intentional. Thus, the preliminary instruction given by the trial court appropriately framed the issues pled, and did not materially affect the outcome of the case. If there is a question to be resolved on the issue of whether only intentional conduct will support a claim under 42 U.S.C. § 1983 for deprivation of First Amendment rights, it simply cannot be reached in this retaliatory discharge case.

Petitioners' argument misstates both the theories of liability and defense which were argued to the jury, and the law on which the jury was instructed. The district court's Omnibus Order on Motions for Directed Verdict puts these theories back into perspective, and provides the context in which the jury instructions must be viewed:

> **DEPRIVATION VS. CONSPIRACY**
>
> The alleged act by which each Plaintiff was deprived of his constitutional rights was the issuance of nonrenewal contracts. The evidence indicates that the nonrenewal contracts were recommended by Defendant GARDNER, approved by Defendant POPOVICH, and signed by George Perkins. Thus, the only name Defendants who could fairly be said to have participated, either directly or indirectly, in the issuance of nonrenewal contracts are GARDNER and POPOVICH. The Court hereby directs a verdict in favor of MICHELS, NICEWANDER,

> FEDERICO [Floyd], and BERRY on the issue of actual deprivation.[4]
>
> These Defendants remain, of course, potentially liable for *conspiracy* to deprive constitutional rights. Conspiracy is, in fact, "the legal mechanism through which to impose liability on each and all the defendants without regard to the person doing the particular act." *Jones v. Bales*, 58 F.R.D. 453, 458 (N.D. Ga. 1972), *aff'd*, 480 F.2d 805 (5th Cir. 1973) (per curiam).

R10-341. Furthermore, in ruling on proposed jury instructions, the trial court noted:

> . . . the instructions make it clear that if the jury finds that Gardner innocently recommended the issuance of non-renewal contracts but Popovich wrongly approved the recommendation to further the pre-existing scheme Popovich and any conspirators will be liable, but Gardner would not be liable.

R30-2988.

The instructions clearly informed the jury that a deprivation of petitioners' civil rights could be found, and the conspiracy issue considered, if petitioners proved the elements of their cause of action "as to *either* defendant [Gardner or Popovich]." R30-3138-41. Moreover, the instructions regarding conspiracy made it clear that other participants could be held liable, assuming the jury found a deprivation, even if Gardner acted innocently. R30-3141-44.

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[4] The directed verdicts in favor of respondents Michels, Nicewander, Floyd and Berry on the issue of actual deprivation were not appealed.

Against this backdrop, petitioners' arguments in support of issuance of a writ of certiorari lose considerable force, if they are not completely eviscerated. Respondents' defense theory did not turn on Gardner's state of mind. Rather, respondents consistently asserted that Gardner's decision to recommend issuance of terminal contracts was not substantially motivated by petitioners' protected speech because the issue of Taylor's whistleblowing (he did not even know of any whistleblowing activity by Cotton) was not of concern to him, and no other respondents played a role in his decision.

The conceptual difficulty in reconciling the notion of "retaliation" with something less than intentional conduct is reflected in petitioners' tortured attempt to demonstrate how the asserted error could possibly have affected the outcome of this case. Pursuant to the instructions given to them on the issue of retaliatory discharge, the jury found that petitioners' claims did not pass the *Mt. Healthy* test; i.e., that their protected speech was not a substantial or motivating factor in Gardner's decision to recommend issuance of the terminal contracts, nor in Popovich's approval of that recommendation. Regardless of whether Gardner knew or did not know of the alleged retaliatory intent of others, the jury's finding that *his* actions did not amount to a deprivation of petitioners' First Amendment rights was amply supported by the evidence.[5] The jury obviously rejected petitioners' contention that there was an "execution order;" therefore, the

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[5] The apparent contention that Gardner's *lack* of knowledge of a supposed plot to terminate petitioners rendered him culpable nonetheless is specious.

argument that the jury could have found that Gardner "recklessly" carried out such an order is without basis.

The jury having determined that petitioners' protected speech was not a substantial or motivating factor in either Gardner's or Popovich's decisions regarding issuance of the terminal contracts, there was no First Amendment deprivation in the terminations. As a result, the allegedly "reckless" conduct of the remaining respondents in "conspiring" to terminate petitioners was rendered irrelevant.

Finally, the suggestion that the respondents "recklessly failed to supervise King" and that Popovich "recklessly failed to supervise Gardner" has never been raised. This theory was not pled, nor was it ever argued as a basis for liability. Thus, the contention that the jury instruction at issue was inconsistent with *Haynesworth v. Miller*, 820 F.2d 1245 (D.C. Cir. 1987), to the extent that case discusses supervisory liability, is one which cannot be reached in this case.

A review of the jury instructions as a whole leaves no doubt that the jury was properly instructed on the elements of liability in a retaliatory discharge claim, and that no reversible error occurred. *See Johnson v. Bryant*, 671 F.2d 1276, 1280 (11th Cir. 1982). The jury was given a "clear and concise statement of the law applicable to the facts of the case," which was neither misleading nor confusing. *Hanover Fire Ins. Co. v. Sides*, 320 F.2d 437, 444 (5th Cir. 1963). *See also Samples v. City of Atlanta*, 916 F.2d 1548 (11th Cir. 1990) (instruction which advised the jury that police officer must have acted "knowingly" in order

to establish liability under 42 U.S.C. § 1983 did not confuse issue by suggesting subjective intent to harm, viewing jury charges as a whole). Because the claim pursued by petitioners was that respondents had intentionally retaliated against them for the exercise of their First Amendment rights, the general instruction could not have misled the jury under the facts of this case, nor did it result in a "substantial impairment" of petitioners' right to redress. As a result, petitioners' arguments in favor of issuing the writ of certiorari are without merit.

II. THE DISTRICT COURT'S DISCRETIONARY RULING EXCLUDING THE PROFFERED EXPERT TESTIMONY ON "WHISTLEBLOWING" DOES NOT SUPPORT ISSUANCE OF THE WRIT; THE RULING WAS WITHIN THE TRIAL COURT'S BROAD DISCRETION AND WAS NOT MANIFESTLY ERRONEOUS.

The trial court's exclusion of the testimony of petitioners' proffered expert does not support issuance of the writ requested. Petitioners' argument overlooks the broad discretion with which the trial court is vested in ruling upon evidentiary matters, and ignores the factual and procedural context in which the district court's ruling was rendered. This case does not present a circumstance which calls for clarification of Fed. R. Evid. 702 and 704, nor do the decisions below undermine a plaintiff's ability to prove allegations of unconstitutional retaliatory conduct.

Petitioners tendered "expert" Thomas Devine to testify that the facts of this case fit "classic commonly recognized patterns of whistleblowing, and retaliatory action

taken by defendant . . . " R22-1362. The district court determined that the proffered testimony did not meet the requirements of Fed. R. Evid. 702, and granted respondents' motion *in limine* to exclude the expert testimony. R22-1366-7.

The relevant inquiry under Rule 702 is whether expert testimony will aid the jury in resolving the issues before it. *Worsham v. A.H. Robins Co.*, 734 F.2d 676, 685 (11th Cir. 1984). *See also Little Oil Co., Inc. v. Atlantic Richfield Co.*, 852 F.2d 441, 446 (9th Cir. 1988) (noting that test for admissibility under Rule 702 is whether the jury will receive "appreciable help.") In this regard, petitioners' argument proceeds upon a faulty premise. Under the facts of this case, expert testimony regarding institutional reaction to whistleblowing was *not* "essential" to the jury's understanding of the evidence. Where the jury has before it all the evidence it needs to make its determination, expert testimony is not necessary, and may be properly excluded under Rule 702. *Salem v. United States Lines Co.*, 370 U.S. 31, 35 (1962).

The jury in this case was called upon to decide a factual dispute; i.e., whether petitioners' protected speech was a substantial or motivating factor in the decision not to renew their employment contracts. Under the facts developed at trial, the issue with which the jury was confronted was purely one of credibility: either they believed Adelaide Snyder when she testified that the respondents actively worked to retaliate against petitioners, or they did not. Resolution of this dispute did not require the assistance of an expert.

In *Salem*, this Court recognized the general rule

> that expert testimony not only is unnecessary but indeed may properly be excluded in the discretion of the trial judge "if all the primary facts can be accurately and intelligibly described to the jury, and if they, as men of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training, experience, or observation in respect of the subject under investigation. . . . " *United States Smelting Co. v. Parry*, (CA 8 Utah) 166 F. 407, 411, 415.

The determination of whether an expert's testimony will assist the jury is within the sound discretion of the trial judge. *Scott v. Sears, Roebuck & Co.*, 789 F.2d 1052 (4th Cir. 1986).

In this case, there was direct evidence – if the jury chose to believe it – of the premise which petitioners sought to establish. It is the availability of *direct* evidence in this case which serves to distinguish the line of *modus operandi* cases upon which petitioners place primary reliance. For example, there would be no need for such testimony if an eyewitness testified directly that vials and wax paper bags found in the defendant's home were used in running a retail drug operation,[6] or that the availability of sexually explicit photographs in the workplace encouraged him to view and interact with a female co-worker as if she were a sex object.[7] Here, the primary facts were

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[6] *See United States v. Dunn*, 846 F.2d 761 (D.C. Cir. 1988).

[7] *See Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991).

presented to the jury in the form of Adelaide Snyder's testimony, and the jury was as capable of understanding and drawing the correct conclusions from those facts as any so-called "expert." *See Williams v. Pro-Tec, Inc.*, 908 F.2d 345, 349 (8th Cir. 1990).

As noted by the trial court, what petitioners sought was to have Mr. Devine present, in the guise of expert testimony, their argument regarding the conclusion the jury should draw from the evidence. R22-1366. An expert's opinion which merely tells the jury what conclusion to reach, however, is not helpful to the jury, and may properly be excluded. *Montgomery v. Aetna Casualty & Surety Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990). *See* Advisory Committee Notes to Fed. R. Evid. 704 (noting that abolition of the ultimate issue rule does not support admission of opinions which merely tell the jury what result to reach).

Petitioners' narrow focus on the trial court's statement that the subject matter was not so "scientific" as to require expert testimony is misplaced. In the first place, the trial court did not limit its remarks in the manner suggested by petitioners. The court also stated: "I don't believe there is any difficulty in presenting this argument to the jury . . . " R22-1367. Regardless of the trial court's terminology, however, it is clear that no *specialized* knowledge was required to resolve the issues in the case. *See Ward v. Westland Plastics, Inc.*, 651 F.2d 1266 (9th Cir. 1980) (issue of whether gender was basis of discrimination not so technical as to require aid of expert testimony).

The Eleventh Circuit Court of Appeals properly held that the trial court's exclusion of the proffered expert

testimony was not manifestly erroneous. *See Barfield v. Orange County*, 911 F.2d 644, 651 n.8 (11th Cir. 1990), *cert. denied sub. nom. Barfield v. Lamar*, 111 S.Ct. 2263 (1991) (exclusion of expert testimony that plaintiff was victim of racial discrimination on grounds that it would not assist trier of fact not abuse of discretion).

The judgment of the circuit court did not amount to a blanket ruling prohibiting the use of "whistleblowing" experts in every case involving a claim of retaliatory discharge. In fact, the rulings below do not at all affect the use of such an expert in the appropriate factual setting. This case simply did not present a circumstance in which such testimony would have been of assistance to the jury, and the district court's discretionary ruling represented a straightforward application of Fed. R. Evid. 702. In the context of this case, this evidentiary ruling does not serve as a basis for invoking this Court's jurisdiction.

CONCLUSION

Based on the foregoing arguments and authorities, this Court is respectfully requested to deny the petition for a writ of certiorari.

Respectfully submitted,

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